

D.P.U. 89-DS-111

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by Silversmith Excavating Co., Inc.

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APPEARANCE: David A. Tebbetts, Treasurer  
Silversmith Excavating Company, Incorporated  
3 Silversmith Way  
North Billerica, Massachusetts 01862  
FOR: SILVERSMITH EXCAVATING COMPANY, INC.

Robert Smallcomb  
Division of Pipeline Engineering and Safety  
Department of Public Utilities  
100 Cambridge Street  
Boston, Massachusetts 02202  
FOR: THE DIVISION OF PIPELINE ENGINEERING  
AND SAFETY

## I. INTRODUCTION

On December 11, 1989, the Pipeline Engineering and Safety Division ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Silversmith Excavating Company Incorporated ("Silversmith" or "Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on October 10, 1989 on Center Street, Andover, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to provide proper notice and also failed to exercise reasonable precautions during the excavation, causing damage to an underground gas service line operated by Bay State Gas Company ("Bay State" or "Company").

On January 10, 1990, the Respondent replied by letter, stating that it had not violated the Dig-Safe Law. In that letter, the Respondent alleged that it had notified Dig-Safe prior to excavation and had also contacted Company personnel working in the immediate area to request additional markings when the Respondent had doubts as to the accuracy of the initial markings. In a letter dated November 13, 1990, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law because its excavation had continued beyond the area it requested in its Dig-Safe request, and also informed the Respondent of its right to request an adjudicatory hearing.

On November 29, 1990, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice an adjudicatory hearing was held on January 15, 1991, pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq. Bob Smallcomb, a public utility engineer from the Division, represented the Division. William J.

White, a distribution supervisor for the Company, testified for the Division. The Division offered six exhibits. The Respondent was represented by David A. Tebbetts, a foreman for the Silversmith. George Johnson, an operator for the Silversmith, testified for the Respondent. The Respondent presented three exhibits. All exhibits were moved into evidence.

During the hearing, the hearing officer granted a request by the Division for a post-hearing investigation to resolve crucial factual disagreements. On January 23, 1991, Robert Smallcomb issued a memorandum to the Department regarding the post-hearing investigation of those facts. On March 26, 1991, the hearing officer sent copies of the memorandum to the Respondent and to Bay State. Bay State sent a response to the Department on April 23, 1991. The Respondent did not respond to the memorandum. At this time, the Department hereby moves the memorandum and Company's response to the memorandum into evidence as RR-1 and RR-2, respectively.

## II. SUMMARY OF FACTS

### A. The Division's Position

Mr. Smallcomb alleged that the Respondent had failed to tender proper notification (Tr. at 5; Exh. D-1). The Respondent's initial Dig-Safe notice named 83 Center Street in Andover, from the street to the house, as the address and location of the excavation (Tr. at 8; Exh. D-2). Mr. White testified that the Company found no underground utilities in front of 83 Center Street during the original marking (Tr. at 18). Mr. White also testified that the service line that was damaged went to 82 Center Street, which was off-set across the street from 83 Center Street (id. at 14-15, 38). Mr. White further testified that this line was not marked by the Company (id. at 18). He maintained that the Company's reason for not marking the service line was because

"The service line is...on the opposite side of where they [Silversmith] were going to [excavate], and we figured it would not be in harm's way." (id.).<sup>1</sup> He also maintained that the service line for 82 Center Street was not located in front of 83 Center Street (id. at 16).

Mr. White testified that the service line for 82 Center Street was located six feet in front of the end of the main (id. at 14, 18; Exh. D-2). Mr. White also testified that the main on Center Street ended in front of 82 Center Street (Tr. at 14). He further testified that the Company had marked the end of the main line and 40 feet of the main down the even side of the street (id. at 14, 18, 37; Exh D-2).

Finally, he testified that he was not aware of any additional phone calls requesting a remarking of the area, or any remarking made by the Company (Tr. at 19).

#### B. The Respondent's Position

Mr. Tebbetts stated that the Respondent damaged a gas service line while excavating on the odd side of the street, close to the true end of the main, in front of 83 Center Street (id. at 25-26, 43; Exh. D-6). The Respondent provided photographs showing the damage occurred on the odd side of the street, closer to 83 Center Street than to 82 Center Street (Exh. S-3D). Mr. Johnson testified that the damage had occurred on the odd side of the street in front of 83 Center Street and presented pictures of a tree that he contended was the property line marker of 83 Center Street (Tr. at 26, 28; Exh. S-C).

Mr. Tebbetts contended that the Company's markings were inaccurate (Tr. at 48). Mr.

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<sup>1</sup> Mr. White testified that he was not "directly involved in the field," during the time of the damage, although he also stated that he visited the site over a year later (Tr. at 34, 37).

Tebbetts maintained that the Company's original markings stopped in front of 81 Center Street, 100 feet before 83 Center Street, and were on the even side of the road (id. at 23-24, 30, 44). He stated that 82 and 83 Center Street are directly across the street from one another and that the damaged facility was a service line that served 82 Center Street (id. at 43, 46). He also stated that the service line to 82 Center Street was not marked (id. at 46). Mr. Johnson contended that this service line was within the property lines of 83 Center Street, and the Company should have marked it in accordance with the Respondent's Dig-Safe request (id. at 29-30). Mr. Tebbetts stated that the lack of Company markings prompted him to assume that no underground facilities existed in the vicinity of 83 Center Street, whereupon he installed a water service line and damaged the Company's underground facility (id. at 24, 46).

Mr. Tibbetts stated that during a town inspection of the water service line, a town engineer informed him that the Company's markings were inaccurate (id. at 24). Upon hearing this, Mr. Tebbetts stated that he stopped excavation and contacted a group of Company employees whom he had noticed were working in the area (id.). He stated that those Company employees contacted the man who had performed the original marking, who returned to mark the appropriate area while the Respondent postponed its excavation (id. at 24-25). Mr. Tebbetts further testified that the man who marked the area the second time informed the Respondent that no underground facilities existed in the area of excavation (id. at 25).

### III. POST-HEARING INVESTIGATION

In an attempt to clarify the exact location of the damage and relevant markings, the hearing officer granted the Division's request for a post-hearing investigation. After completing a

post-hearing investigation, the Division indicated that the damage had occurred five feet outside the property line of 83 Center Street (Exh. RR-1). The Division also reiterated that the Respondent had violated the Dig-Safe Law by failing to properly define the locus of their excavation (id.).

In its post-hearing memorandum, the Division stated that the Company's original markings were 80 feet short of the true end of the main, and that the main was located on the odd side of the street as the Respondent had testified (id.). In addition, the Division stated that the Company had remarked the site in response to a request by the Respondent, although the accuracy of the Company's second markings was uncertain (id.).

In the Company's response to the Division's investigation, it stated that the road was not paved, and that the boundaries of the lot were questionable, and that these and other factors led to the questionable mis-mark by the Company (Exh. RR-2).

### III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

No person shall, except in an emergency,...make an excavation...unless at least seventy-two hours, exclusive of Saturdays, Sundays and legal holidays, but no more than thirty days, before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation... Such notice shall set forth the name of the street or the route number of said way and a reasonably accurate description of the location in said way...

The Department has held that a contractor's notice must adequately name the street of the proposed excavation, and give a reasonably accurate description of the location where the

excavation is to be made. Boston Gas Company, D.P.U. 88-DS-3 at 5 (1990).<sup>2</sup>

The statute also assigns to the company the responsibility to mark the location of all company facilities in the area of the proposed excavation. The Department has found, however, a utility is not in violation of the Dig-Safe Law by failing to mark its facilities when an excavator who requests a location excavates in an area that is not within the scope of its initial request. See Colonial Gas Company, D.P.U. 86-DS-23 (1987). In that case, the address requested by the excavator was 25 Bradford Road. Accordingly, when the excavator excavated at 24 Bradford Road, the Company was not found in violation of the Dig-Safe Law.

The Department has held that excavating in an area over 100 feet from the area requested by an excavator to be marked was not "reasonably accurate" as the Dig-Safe Law mandates. R.J. Cincotta Co., Inc., D.P.U 89-DS-76 (1990).

G.L. c. 82, § 40 also states:

After a company has designated the location of such pipes, mains wires and conduits at the locus of the excavation in accordance with the provisions of this section, the excavator shall be responsible for maintaining the designation markings at such locus, unless the said excavator requests re-marking at the locus due to obliteration, destruction or other removal of such markings and the company shall then have twenty-four hours following the receipt of such request to remark such

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<sup>2</sup> In 1991, the Department promulgated regulations setting forth guidelines for what constitutes "reasonably accurate." 220 C.M.R. 99.04. Those regulations provided that: (1) to the extent reasonably practicable, notice of a non-emergency excavation shall include: (a) the city or town where the excavation will take place; (b) the name of the street, way, or route number of the excavation site; (c) the name of the streets at the nearest intersection to the excavation; (d) the number of the building closest to the excavation; (e) and/or other descriptions of the excavation site including landmarks and utility pole numbers, and (f) the date and location of any blasting.

locus.

The Dig-Safe Law cited above states that excavators must call for a remarking if markings are lost after being properly laid by a company. See Amorello & Sons, Inc., D.P.U. 90-DS-6 (1993); Todesca Equipment Company, D.P.U. 90-DS-4 (1992); Lachance Excavating Company, Inc., D.P.U. 87-DS-178 (1990)

### ANALYSIS AND FINDINGS

The issues to be decided include: (1) whether the description of the location given to Dig-Safe by the Respondent was reasonably accurate; and (2) whether the Respondent's call for a remarking was proper.

In addressing the first issue, the Respondent presented evidence showing that the excavation occurred on the odd side of Center Street, within the property lines of 83 Center Street. The Respondent also presented evidence showing that the service line that was damaged extended to 82 Center Street from the main on Center Street. The results of the post-hearing investigation also indicated that the main line on Center Street ran along the odd side of the street in front of 83 Center Street, as the Respondent had contended, and not along the even side of the street.

Although the Division presented a sketch that indicated the location of the damage occurred outside of the property lines of 83 Center Street, the Division only provided a hand-drawn sketch that was not to scale. In addition, the Division presented no evidence indicating that the property lines drawn on the sketch were accurate.

The Respondent's Dig-Safe notice named 83 Center Street, from street to house, as the



area of excavation. In light of the evidence presented, the Department finds that the Respondent provided a reasonably accurate description of the excavation site in its Dig-Safe notice, and therefore, did not violate the Dig-Safe Law.<sup>3</sup>

In addressing the issue of whether the Respondent's request for remarking was proper, the Respondent testified that it had contacted a nearby Company work crew and asked them to contact the person who had laid down the original markings to remark the site. Although the Company denied having records of remarking the area, testimony from Mr. Tebbetts and Mr. Johnson, and evidence contained in the Division's post-hearing memorandum indicate that the site was remarked.

The Dig-Safe Law provides that excavators request remarking at a locus due to obliteration, destruction or other removal of such markings. Pursuant to the Dig-Safe Law, excavators should contact companies with underground facilities in the area of excavation or Dig-Safe to request a remarking of an area. See Construction Solutions, D.P.U. 89-DS-17 (1993); W.D. Cohen, D.P.U. 89-DS-18 (1993).

In the instant case, the Respondent contacted Company employees in the area who then contacted the authorized company employee who had originally marked the site. This authorized Company employee then remarked the site. Therefore, the Department finds that the Respondent

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<sup>3</sup> In situations where the locations of property lines are uncertain, the Department encourages excavators to include a description of all properties in the excavation area in their Dig-Safe request, and also encourages utility companies to complete a comprehensive marking of that area.

contacted the Company for a remarking and did not violate the Dig-Safe Law.<sup>4</sup>

### III. ORDER

Accordingly, after due notice, hearing and consideration, the Department

FINDS: That Silversmith Excavating Company Incorporated did not violate the Dig-Safe Law when it excavated on Center Street in Andover Massachusetts; and it is

ORDERED: That the NOPV issued against the Respondent be and is hereby DISMISSED.

By Order of the Department,

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The Department cautions that it does not condone the Respondent's method of contacting the Company to request a remarking of the excavation site. The Respondent should have contacted either the Company directly or Dig-Safe. Had the employees performed the marking themselves or contacted a company employee who was not authorized to mark the site, the Respondent would have been in violation of the Dig-Safe Law. See Construction Solutions supra; W.D. Cohen supra.